

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
TWENTY-SEVENTH REGION**

Castle Pines Homes Association, LLC¹

Employer,

and

Case 27-RC-8511

United Government Security Officers of America
International Union,

Petitioner.

**HEARING OFFICER'S REPORT ON A CHALLENGE TO AN ELECTION
BALLOT WITH RECOMMENDATIONS TO THE BOARD**

Pursuant to a Stipulated Election Agreement approved in this case by the Regional Director, Region 27, of the National Labor Relations Board on January 27, 2008², an election by secret ballot was conducted on February 6, in the following appropriate unit:

All full-time and regular part-time gate officers, patrol officers, and dispatchers employed by the Employer at Castle Pines; excluding all office clerical employees, professional employees, sergeants, and supervisors as defined in the Act.

Upon conclusion of the election, a Tally of Ballots was furnished to the parties which showed 7 votes cast in favor of the Petitioner, 7 votes cast against the Petitioner and 1 challenged ballot, a number sufficient to affect the results of the election. The challenged ballot is that of Kristi Nichols. Nichols' ballot was

¹ The correct name of the Employer as amended at hearing.

² All subsequent dates to be 2008.

challenged by the Board Agent because her name did not appear on the voter eligibility list (*Excelsior* list).

On February 15th, the Regional Director, pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, issued and served on the parties an Order Directing Hearing on Determinative Challenges and Notice of Hearing. The Regional Director found that there were substantial and material issues of fact, including matters of credibility, which could best be resolved through an evidentiary hearing. The Regional Director ordered that a hearing be held before a Hearing Officer for the purpose of receiving evidence to resolve the issues raised by the Challenge and that the designated Hearing Officer should, after conducting such a hearing, prepare a report to be served upon the parties, containing a resolution of credibility of witnesses, findings of fact, and recommendations to the Board regarding the disposition of this Challenge.

Pursuant to the Notice of Hearing of the Regional Director, a hearing was held before the undersigned designated Hearing Officer on February 22 and February 25, in Denver, Colorado. At the hearing, both parties fully participated and were afforded full opportunity to be heard, to present testimony, to call, examine, and cross-examine witnesses, to otherwise introduce evidence relevant to the issues involved, and to file post-hearing briefs.

Upon the entire record, including my observation of the witnesses and my consideration of the post-hearing briefs, I make the following findings of fact and recommendations to the Board.

A. Positions of the Parties

The Petitioner contends that Nichols is an eligible voter, because she is a regular part-time Gate Officer and Dispatcher, both classifications included in the unit in the Stipulated Election Agreement (stipulation), and that her ballot should be counted. The Employer maintains that Nichols should be excluded from the unit on the basis that Nichols' full-time position as a Receptionist was specifically excluded in the stipulation, that Nichols is not a regular part-time Gate Officer or Dispatcher, that Nichols' ballot should not be counted in order to maintain the privacy and secrecy of her vote, and that Nichols, as Receptionist, cannot be included in a unit with guards under Section 9(b)(3) of the Act.

B. Applicable Legal Standard

The Board has long held that, when resolving determinative challenged ballots in cases involving stipulated bargaining units, its function is to ascertain the parties' intent as to inclusion in the unit and then to determine whether this intent is contrary to any statutory provision or established Board policy.

Northwest Community Hospital, 331 NLRB 307 (2000) citing *Tribune Co.*, 190 NLRB 398 (1971). In *Caesar's Tahoe*, 337 NLRB 1096 (2002) the Board expressly adopted the three-prong analysis used in *Associated Milk Producers, Inc. v. NLRB*, 193 F. 3d 539 (D.C. Cir. 1999).

Under this test, the Board must first determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board simply enforces the agreement. If the stipulation is ambiguous, the Board must seek to determine the parties' intent through normal methods of contract interpretation, including the examination of extrinsic evidence. If the

parties' intent still cannot be discerned, then the Board determines the bargaining unit by employing its normal community-of-interest test.

Caesar's Tahoe, supra, at 1097.

C. Application of *Caesar's Tahoe* Test

1. Objective intent of the parties

I first analyze the language in the stipulation and conclude that the stipulation does not resolve the intent of the parties with respect to the inclusion or exclusion of employees who work in both included and excluded categories. While the stipulation clearly excludes "all office clerical employees" and evidence adduced at hearing established that Nichols is a full-time Receptionist for the Employer, the stipulation does not address the effect of Nichols also working in the included classifications of Gate Officer and Dispatcher. I find that the language in the stipulation does not resolve this issue and, accordingly, it is proper to consider extrinsic evidence to discover the parties' intent.

2. Extrinsic Evidence

The second prong of the analysis is to look at the extrinsic evidence. In this regard, the Employer offered the testimony of Mark Larsen, the General Manager, who testified that when he prepared the *Excelsior* list,³ he meant to

³ The voter eligibility list contains the names of sixteen names employees in the Emergency Services division: four Dispatchers, eight Gate Officers, and one regular part-time Gate Officer and three Patrol Officers.

exclude Nichols as a full-time Receptionist. Although the Employer concedes that Nichols performs some unit work as a Dispatcher and Gate Officer, Larsen further testified that when he prepared the *Excelsior* list, he purposely included an employee who worked as a Dispatcher for one eight-hour shift every Sunday, since she was a regularly scheduled part-time Dispatcher and he purposely excluded Nichols since she is never regularly scheduled to work any hours at any particular time as Gate Officer or Dispatcher. Larsen testified that in accordance with the definitions in the Employee Manual, which the Employer entered into evidence, Larsen considers Nichols to be a “Seasonal/Temporary” employee who temporarily supplements the workforce and not a “Regular Part-Time” employee, which are those employees not assigned to a temporary status and who are regularly scheduled to work less than 30 hours per week.

However, the Petitioner appears to contend that, regardless of the definition in the Employee Manual, Nichols does, in fact, work for the Employer as a part-time Dispatcher or a part-time Gate Officer on a regular basis. Thus, the extrinsic evidence offered by the Employer consists solely of Larsen’s subjective mental processes in not including Nichols on the *Excelsior* list and the Employee Manual’s definition of regular part-time employment. I find that the extrinsic evidence offered by the Employer does not resolve the issue of the parties’ intent as to the stipulation. In light of the foregoing, the challenge to Nichols’ ballot must be resolved by applying the Board’s community-of-interest principles.

3. Nichols' community of interest with the bargaining unit

Although the third prong of the test is to look at whether Nichols shares a community of interest with the bargaining unit, the issue raised by the record evidence is whether Nichols is a dual-function employee whose work in unit classifications creates a shared community of interest between her and the bargaining unit employees. Dual-function employees are those who perform more than one function for the same employer. "The Board has generally considered an employee with job responsibilities encompassing more than one position to be a dual-function employee and has done so without regard to the seemingly separate nature of the employment relationships giving rise to the multiple job functions." *Columbia College*, 346 NLRB No. 69 (2006) citing *Marine Petroleum Co.*, 238 NLRB 931 (1978)(finding it "apparent" that an employee who worked full time as an accountant and part-time as a dispatcher with different terms and conditions of employment, salaries, and benefits was a dual function employee) and *Alpha School Bus Co.*, 287 NLRB 698 (1987)(finding dual function status where an employee working as a bus driver and as a mechanic for the employer, wore different uniforms for each position, had different supervisors for each position, punched in with different timecards, and received different pay and benefits).

Dual-function employees who spend part of their work time performing bargaining unit work may share a sufficient community of interest with the unit to be eligible to vote, even though they do not spend the majority of their time performing unit work. *Columbia College*, supra, reaffirming *Berea Publishing*

Co., 140 NLRB 516 (1963), which held that unit placement of dual-function employees is determined by a variant of the Board's traditional community of interest test. "The Board has long held that employees who perform more than one function for the same employer may vote, even though they spend less than a majority of their time on unit work, if they regularly perform duties similar to those performed by unit members for sufficient periods of time to demonstrate that they have a substantial interest in working conditions of the unit." *Berea Publishing* at 518-519. Once an employee is determined to regularly perform a substantial amount of unit work, it is inappropriate to consider other aspects of the dual-function employee's terms and conditions of employment in a second-tier community of interest analysis. *Continental Cablevision*, 298 NLRB 973 (1990) citing *Oxford Chemicals*, 286 NLRB 187 (1987).

a. Background facts regarding the time that Nichols spends performing unit work

The record establishes that the Castle Pines Homes Association is comprised of two entities: the Homes Association (HOA), which consists of mainly administrative positions, including Receptionist; and Emergency Services, which are the Patrol Officers, Gate Officers, and Dispatchers. Castle Pines is a gated community and all the roads inside are private.

According to Larsen, Gate Officers work at the gates and are responsible for controlling access to the community. Patrol Officers patrol the community, respond to alarms, do random patrolling, do vacation checks of houses of

people that are on vacation, and do traffic enforcement within the village.⁴

Dispatchers monitor the closed circuit television cameras, which are located throughout the community, take and respond to calls for assistance, monitor the alarm systems, and control the access of the gates whenever the gates are not staffed. The Emergency Services division operates twenty-four hours a day, seven days a week.

Nichols started working for the Employer part-time for Emergency Services in October 2006 and started working full-time for Emergency Services in approximately January 2007. At the beginning of June 2007, Nichols began working as full-time Receptionist for the HOA, but continued working for Emergency Services in what she considered to be part-time employment. The record establishes that Nichols typically works 40 hour work week, usually from 8:00 a.m. to 5:00 p.m. Monday through Friday, as Receptionist. Nichols testified that as Receptionist, she takes telephone calls, copies paperwork, faxes paperwork, orders supplies, maintains the boardroom, and other office clerical functions. She reports first to Lisa Goodwin, in HOA, then to Larsen. The record shows that she receives performance evaluations only for her duties as Receptionist. The record further shows that Nichols makes vacation requests only to her supervisor in HOA.

It is undisputed that, although Nichols works as Gate Officer and Dispatcher, she is not regularly scheduled to work for Emergency Services. However, the record shows that Nichols continues to work additional hours for

⁴ Patrol Officers carry weapons. They are the only employees that do so.

Emergency Services, usually on the weekends or in the evenings. Emergency Services maintains an “overtime desired” sign-up sheet, called an Overtime Schedule, that it posts so that qualified employees have the opportunity to sign up to work additional hours for Emergency Services. Nichols frequently signs up to work those additional hours.⁵

According to Nichols, an administrator for Emergency Services will sometimes ask her to work a position or if she wants to work the hours available before the Overtime Schedule is posted. Nichols testified that this occurs approximately once every two weeks and that, when this happens, she is not required to accept these hours.⁶ As noted, Nichols also chooses to work available hours on her own initiative. When Nichols signs up to work as a Gate Officer or a Dispatcher, she signs up for whichever position is available and she works both equally. Nichols testified that as Dispatcher, she takes telephone calls, monitors the alarm system, and controls gate access and that as Gate Officer, she handles access control, checks and verifies insurance, and makes sure visitors for the village are granted access through the homeowners. Nichols is required to wear a uniform when she is working as Gate Officer and Dispatcher. When she is working as Gate Officer or Dispatcher, Nichols reports to Emily Oxby in Emergency Services. Nichols is paid a different rate when she works for Emergency Services; instead of her Receptionist rate, she is paid on the same scale as the other Gate Officers and Dispatchers. She receives her

⁵ At the present time, Nichols is the only person working for the Employer who is not a full-time Gate Officer, Dispatcher, or Patrol Officer, but who is qualified to sign up for additional shifts.

pay from Emergency Services on a different departmental check than the HOA paycheck.

b. Facts and conclusions regarding the regularity and substantiality of Nichols performing unit work

In determining whether dual-function employees regularly perform duties similar to those performed by unit employees for sufficient periods of time to demonstrate that they have a substantial interest in the unit's working conditions, the Board has no bright line rule as to the amount of time required to be spent in performing unit work; rather the Board examines the facts in each particular case. *Martin Enterprises, Inc.*, 325 NLRB 714 (1998) citing *Oxford Chemicals*, supra. In *Marine Petroleum Company*, 238 NLRB 931 (1978) the Board held that that an accountant who worked a 40-hour work week as an account and worked as a dispatcher for 8 ½ hours each Sunday worked a sufficient number of hours to share a substantial community of interest with the other unit employees. See also *Medlar Electric, Inc.*, 337 NLRB 796 (2003)(holding that 25 to 30 percent of the time was sufficient for dual-function status) and *Oxford Chemicals*, supra, (holding that an employee who regularly performed unit work for 25 percent of each working day was included in the

⁶ I find that the fact that Nichols can turn down hours does not outweigh the other factors in determining her to be a dual-function employee. See *Tri-State Transportation Co. Inc.*, 289 NLRB 356 (1988).

unit).⁷ Furthermore, Board law is clear that the test of regularity is based on frequency and not of schedule. See *Continental Cablevision*, supra, and *Tri-State Transportation Co. Inc.*, supra.

The Employer entered into evidence all of Nichols' timecards, entitled Employee Time Report (Time Report), from the date she was hired as a full-time Receptionist in June 2007 through the pay period ending January 26, 2008. A pay period is every two weeks, starting on a Sunday and ending on a Saturday. Each Time Report is marked either "HOA" which refers to Nichols' Receptionist job or "ES" which stands for Emergency Services and refers to the time Nichols spends either working as a Dispatcher or as a Gate Officer.

The Time Reports show that Nichols worked 139.5 regular-time hours⁸ for Emergency Services, 117 overtime hours for Emergency Services and 79 "Toll" hours.⁹ The average number of hours per week Nichols spends performing unit

⁷ The case cited by the Employer, *Los Angeles Water and Power Employees' Association*, 340 NLRB 1232 (2003) is inapposite. In *Los Angeles Water*, the Board had to determine whether the employee who had the position of "accountant" should be properly included in the unit, since "accountant" was not specifically included or excluded in the stipulated agreement. After applying the *Caesar's Tahoe* analysis, the Board determined that the language in the stipulated agreement was ambiguous and there was no helpful extrinsic evidence so the Board applied the traditional community of interest test. In *Los Angeles Water*, the Board was determining whether a position not specifically discussed by the parties should be included; in the instant case, the positions of Receptionist and Gate Officer and Dispatcher are all properly categorized but the parties are not in agreement as to whether Nichols performs both functions to an extent that warrants her inclusion in the unit.

⁸ Although Larsen testified that all of Nichols' work in Emergency Services was paid at the overtime rate, since she had already worked 40 hours per week as Receptionist, Nichols' Time Reports show several occasions where she worked both regular and overtime hours in Emergency Services.

⁹ The Employer did not provide any explanation on the record as to what "Toll" hours are, nor is it clear from the documents admitted into evidence what Toll hours are. Larsen testified that, in regards to the Time Report ending July 28, the Employer had had a builder coming in during that time period, which meant that a gate had to be staffed. Nichols worked those hours, I assume as a Gate Officer to staff the gate. Larsen testified that she was either paid by the developer or the Employer was reimbursed by the developer for those hours that Nichols worked. I note that "Toll" hours appear designated as such only on the Emergency Services Time Reports and this, taken

work for Emergency Services is 7.5 without including the Toll hours and 9.8 including the Toll hours.

As the Employer points out, there are eleven weeks, including two entire pay periods, where Nichols did not work for Emergency Services at all.¹⁰ However, for the remaining twenty-six weeks, Nichols spent a substantial amount of time each week, usually on a Saturday and/or Sunday and a occasionally on a weekday evening, performing unit work as either a Gate Officer or a Dispatcher, including one pay period when she worked 44 regular-time hours for Emergency Services. Though Nichols' average of 7.5 hours or 9.8 hours per week is not regularly scheduled like the employee who is scheduled to work eight hours every Sunday, it is clear that Nichols spends a substantial amount of time performing unit work.

The cases in which the Board found that the employees in question did spend a sufficient amount of time performing unit work are distinguishable. For example, in *Martin Enterprises*, supra, the record showed the employee in question performed unit work for six hours one day, one hour a couple weeks later, and once for an unspecified period of time the month after that and, based on this, the Board in *Martin Enterprises* held that the employee's performance of unit work was sporadic rather than regular and was for an insufficient period of time to warrant the finding that he was eligible to vote as a dual function

with the Employer's testimony regarding covering the gate, leads to my conclusion that "Toll" hours are properly included in the number of hours that Nichols performed bargaining unit work.

¹⁰ Nichols reported "Toll" hours for three of those eleven weeks, which would leave only eight weeks that Nichols did no work for Emergency Services.

employee. *Id.* at 715. See also *Davis Transport*, 169 NLRB 557 (1968)(holding that employees who spent less than three percent of their time performing unit work during a ten-month time period were not included in the unit); and *Mc-Mor-Han Trucking, Co.*, 166 NLRB 700 (1967)(holding that an employee who drove a truck on twenty days during the year with no regularity, pattern or consistent schedule was excluded from the unit of truck drivers). In *Pacific Lincoln-Mercury, Inc.*, 312 NLRB 901 fn 4 (1993) the Board noted that in a footnote that even if the language in the stipulated election agreement was unambiguous—which it was not—an employee spending approximately five to ten percent of his time performing unit work was not sufficient to establish that he was regularly engaged in performing unit work within the meaning of *Berea Publishing*. The bargaining unit work that Nichols performed can clearly be distinguished from the bargaining unit work performed by the employees in *Martin Enterprises* and *Mc-Mor-Han Trucking*, since Nichols performed the work with some regularity and not sporadically or with no pattern. Similarly, the amount of time in percentages that Nichols spent performing unit work can be distinguished from the amount of time that employees in *Davis Transport* and *Pacific Lincoln-Mercury* spent performing unit work because Nichols spent either 18.75% (without Toll hours) or 24.5% (with Toll hours), which is significantly more than 3 percent or “between 5 and 10 percent”.¹¹

¹¹ *Continental Cablevision*, 298 NLRB 973 (1990) can be distinguished in this regard because, although the Board found that employees performing unit work for only 17.28% of the time was insufficient, the Board further found that this work was “merely incidental” to the employees’ primary responsibilities and, thus, not unit work.

However, since neither 18.75% nor 24.5% quite reaches the 25%-30% of time dual-function employees spent performing unit work in *Medlar Electric* and *Oxford Chemicals*, I rely on the Board's policy that there is no bright line rule and look at the other facts of the case. I find this situation most similar to *Marine Petroleum*, supra, the case in which the accountant who worked as a dispatcher eight and half hours a week was found to be a dual-function employee with a sufficient community of interest shared to be included in the unit of dispatchers. The record evidence and Nichols' Time Reports establish that both Nichols and the Employer's regularly scheduled part-time employee work a similar number of hours to the accountant in *Marine Petroleum*. The Employer's regularly scheduled part-time employee works as Dispatcher in Emergency Services for eight hours every Sunday and the Time Reports establish that Nichols averages a comparable number of hours working for Emergency Services. Although Nichols' time working for Emergency Services is not regularly scheduled, it is also not sporadic or without a pattern, as the Time Reports show that Nichols works almost every Saturday and/or Sunday with some weekday evenings. As discussed above, the test of regularity is the frequency and amount of time spent performing unit work and not that the unit work be regularly scheduled.¹² Nichols' work as Gate Officer and Dispatcher may not constitute a regular part-time employment under the definition in the Employer's Employee Manual, but, under applicable Board law, I find that the amount of time Nichols spends

¹² *Continental Cablevision*, supra, and *Tri State Transportation Co., Inc.* supra.

performing unit work and the regularity in which she performs that unit work, qualifies her as a dual-function employee.

In summary, although Nichols spends the majority of her time working full-time as Receptionist, I conclude that she regularly works a sufficient number of hours as Gate Officer or Dispatcher to demonstrate that she has a substantial interest in working conditions of the bargaining unit.¹³

D. Secrecy of Nichols' Ballot

The Employer contends that if Nichols' vote were counted, it would defeat the purpose of a secret ballot and may have an undesired effect on future elections. The Board has long held that "the fact that a voter's identity may be publicly known as an unavoidable result of the challenge procedure does not invalidate his vote in the determination of the election results." *Prestige Hotels, Inc. d/b/a Marie Antoinette Hotel*, 125 NLRB 207 (1959). The Board in *Davidson Chemical Company, Division of W.R. Grace & Co.*, 115 NLRB 786 (1956) wrote: "...[W]e believe that the policies of the Act will best be effectuated by counting the ballots of all eligible voters in determining the choice of a bargaining representative, even if, as result of a challenge procedure, the choice of one or more of the eligible voters becomes public knowledge." See also *The DeVilbiss Company*, 115 NLRB 1164 (1956) and *American Partition*

¹³ This conclusion is bolstered by the fact that the record establishes that when Nichols works as a Gate Officer or Dispatcher she shares the "second-tier" community of interest factors with the bargaining unit, such as the receiving same wage rate, performing the same duties, wearing the same uniform, working under the same conditions and being subject to the same supervision as the regularly scheduled Gate Officers and Dispatchers.

Corporation, 100 NLRB 1 (1952). Based on this, I find that, under well-settled Board law, the unfortunate fact that Nichols' vote will be made public does not prevent opening her ballot and counting it, to discern the choice of all the employees bargaining unit.

E. Inclusion of a Nonguard in a Guard Unit

Finally, the Employer contends that Section 9(b)(3) of the Act prohibits Nichols' inclusion into the unit, as her inclusion would be tantamount to including a nonguard position into a guard bargaining unit.¹⁴ The Employer would have a valid argument if the Petitioner were seeking to represent Nichols in her capacity as Receptionist; however, this is clearly not the case. To the extent that the Petitioner seeks to represent Nichols, it is solely in her capacity as Gate Officer and Dispatcher. It is clear that Nichols' position as Receptionist would not be included in the unit, but since I have found her to be a dual-function employee, her position as dual function Dispatcher and Gate Officer would allow her to be included in the bargaining unit.

¹⁴ Section 9(b)(3) of the Act has two elements in this regard: it prohibits the Board from finding appropriate any bargaining unit that includes both guards and nonguards and it prohibits certification of a union representing a unit of guards if the union admits nonguards to membership or is directly or indirectly affiliated with a union that admits nonguards

Recommendation

Based upon the foregoing facts and conclusions and based upon the entire record herein, it is recommended that the Board overrule the challenge to Nichols' ballot and that her ballot be opened and counted.¹⁵

Dated at Denver, Colorado, this 20th day of March 2008.

/s/ Renee C. Barker, Hearing Officer
Renée C. Barker, Hearing Officer
National Labor Relations Board
700 North Tower, Dominion Plaza
600 Seventeenth Street
Denver, CO 80202-5433

¹⁵ Under the provisions of Section 102.69(i)(2) and 102.69(f) of the Board's Rules and Regulations, the parties may file exceptions to this report with the Board. Exceptions must be filed within 14 days of the issuance of this report and an original and eight copies must be served upon the Board and copies must be immediately served on all other parties and upon the Regional Director, Region 27. In the absence of exceptions, recommendations in this report may be adopted by the Board.

